MESSAGE FROM THE COMMITTEE CHAIR

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This issue of the Environmental Litigation and Toxic Tort (ELTT) Committee’s Newsletter focuses on the Gulf oil spill—by many accounts the largest environmental contamination event in U.S. history, and therefore perhaps the largest environmental litigation matter in U.S. history. Prepared as the first anniversary approached of the blowout of the Macando well, this issue of the ELTT Newsletter provides an overview and analysis of key developments from the first year of Gulf spill litigation.

The first article, by San Francisco attorney Robert Martin, examines the governmental investigations that have taken place in the wake of the spill, including both civil and criminal investigations by the U.S. Department of Justice and the fact-finding investigation into the causes of the accident by a bipartisan national commission established by President Obama.

Next, George Washington University School of Law LLM candidate Sudhir Lay Burgaard provides an overview of the primary claims that are now pending as part of the multidistrict litigation before Judge Carl Barbier of the Eastern District of Louisiana in New Orleans. Such claims include those based in statute and in tort, and seeking damages for economic loss, personal injury and more.

The third article, by Mary Samuels of Balch & Bingham LLP, examines the Gulf Coast Claims Facility (GCCF). The article explores some of the controversies that have surrounded the GCCF, including the extent of its independence from BP p.l.c., the transparency of its claims processing operations, the pace and finality of its claims payments, and the scope of the release that is required of claimants who accept final payments. (The upcoming May/June issue of Trends, the Section on Environment, Energy, and Resources’ bimonthly publication, will include a related point-counterpoint exchange between Alabama Attorney General Luther Strange and GCCF Claims Administrator Kenneth Feinberg, which was arranged and edited by Mary and ELTT Committee Newsletter Vice-Chair Alex Basilevsky).

The fourth article, written by Thomas Jackson of Texas A&M University, provides an overview of property damage claims and an analysis of how they are likely to play out in the context of the Gulf spill. As Tom notes, based on what we know from prior major oil spills in the U.S., the ultimate impact of the Gulf spill on property values is not likely to be as great as many feared at first.

Finally, April Smith of Weston Solutions, Inc., has prepared an overview of natural resource damage (NRD) claims in the context of major environmental releases, including how NRD claims have played out in prior oil spill cases.

I trust you will find these articles on this major environmental event and litigation both interesting and informative. Please contact me (dkrainin@bdlaw.com) or newsletter editor Alex Basilevsky (alex.basilevsky@obermayer.com) with feedback on this issue, suggestions for additional newsletter themes or articles, or if you wish to become more involved in ELTT Committee newsletters, programs or other activities.
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“[T]his oil spill is the worst environmental disaster America has ever faced.” That was how President Obama described the Macondo well blowout a mile deep in the Gulf of Mexico on April 20, 2010. The blowout caused multiple explosions on the Deepwater Horizon drilling rig on the surface; 11 workers lost their lives, 17 others were injured, and the rig sank.

Oil, gas, and other toxic chemicals then began to spew from the damaged well directly into the Gulf. Both BP Exploration and Production Inc. (BP)—the operator of the rig and the well—and the federal government initially estimated 5,000 barrels a day were leaking into the ocean; later evidence showed an average flow rate of between 53,000 and 62,000 barrels a day. The well flowed for months and was finally sealed on September 19, 2010. By then, 4.9 million barrels of oil, or about 206 million gallons, had poured into the water.

The disaster caused immense damage to an extraordinarily diverse ecosystem populated by fish, birds, and sea mammals, including endangered whales, sea turtles, and birds. Over 8,000 different species inhabit (or inhabited) the spill area, and the waters also support considerable fishing, boating, and tourism industries.

The enormity of the spill (by some estimates 20 times the size of the Exxon Valdez oil spill) and the deaths of the 11 rig workers led to several government investigations—including the establishment of a presidential commission to investigate the disaster—and numerous civil lawsuits. This article discusses those investigations.

I. Government Investigations into the Disaster

Of the various government investigations that followed the Macondo well blowout, the most prominent are the criminal and civil investigations announced by the U.S. Department of Justice (DOJ), and the inquiry by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission).1

A. DOJ’s Civil Investigation and Litigation

On June 1, 2010, Attorney General Eric Holder announced that DOJ had initiated civil and criminal investigations into possible violations of criminal and civil statutes applicable to the disaster, including the Clean Water Act and the Oil Pollution Act of 1990. As a result of the civil investigation, DOJ filed a civil suit on December 15, 2010, in federal court in the Eastern District of Louisiana.2 The suit names nine defendants, including BP, several Transocean entities (Transocean Deepwater Inc. owned the Deepwater Horizon rig, which it leased to BP); as well as insurers and minority interest owners of the Macondo well (i.e., BP held a 65 percent share in the well, Anadarko Petroleum Corporation, 25 percent, and MOEX Offshore 2007 LLC, 10 percent). Noticeably absent from the caption are Halliburton, responsible for cementing the Macondo well; and Cameron International, manufacturer of the blowout preventer that failed to prevent the blowout.

The complaint’s principal claims allege that the defendants failed to take necessary precautions to secure the Macondo well before the April 20 explosion; failed to use the best available and safest drilling technology to monitor the well’s condition; failed to maintain continuous surveillance of the well; and failed to use and maintain equipment and materials that were available and necessary to ensure the safety and protection of personnel, property, natural resources, and the environment. Federal regulations impose many of those duties upon oil drillers.3

The complaint sets forth two causes of action: declaratory relief to hold the defendants “responsible and strictly liable for unlimited removal costs and damages” under the Oil Pollution Act; and civil penalties under the Clean Water Act “for each barrel of oil that the Defendants discharged into the Gulf of Mexico.” Although the complaint does not specify the amount of damages sought, the defendants’ joint and several liability exposure under both of those statutes is significant.

The Oil Pollution Act imposes strict liability upon “each responsible party” for various removal costs and
damages resulting from an oil spill. Ordinarily, a defendant’s liability is capped at removal costs plus damages of $75 million. But if a defendant’s gross negligence contributed to the spill, that $75 million cap disappears, and damages become unlimited. According to the complaint, BP has already admitted that it is a “responsible party” under the act. The complaint also notes that the United States sustained damages “far exceeding” $75 million (but without attribution to any specific defendant), suggesting DOJ will seek to prove gross negligence.

For oil spills, section 311 of the Clean Water Act imposes a strict liability statutory penalty of $1,100 per barrel spilled, but in cases of gross negligence, the penalty increases to $4,300 per barrel. Using the estimate of 4.9 million barrels spilled, the defendants’ strict liability exposure is $5.39 billion. But if DOJ proves gross negligence, the penalty increases to $21.07 billion. That is, a finding of gross negligence can make a $15 billion difference.

B. DOJ’s Criminal Investigation

In his June 1, 2010, announcement, Attorney General Holder also stated that DOJ was investigating potential criminal violations under various statutes. In addition to the civil penalties noted above, the Clean Water Act provides for criminal penalties and incarceration for violations involving negligence or more egregious behavior. For example, negligent or knowing violations could result in fines of up to $50,000 per day, three years imprisonment, or both. Violations involving “knowing endangerment”—i.e., knowingly placing a person in imminent danger of death or serious bodily injury—could result in fines up to $250,000, 15 years in prison, or both. For organizations, the fine increases to $1 million.  

DOJ will also look to the Alternative Fines Act. Where the criminal offense “results in pecuniary loss to a person other than the defendant, the defendant may be fined . . . twice the gross loss. . . .” According to one study sponsored by the U.S. Travel Association, the Gulf coast tourist industry could suffer $22.7 billion in damages resulting from the spill, doubling that loss results in a potential $45 billion fine. This larger fine would replace the statutory maximum found in the Clean Water Act.

And there is ample precedent for such a result. In 1991, following the Exxon Valdez spill, Exxon and an affiliate settled all federal and state civil claims and pleaded guilty to criminal violations of the Clean Water Act and other environmental statutes, agreeing to a total payment and fine of $1 billion. DOJ also recently employed the Alternative Fines Act in a plea agreement with BP Products North America, Inc., in which the company paid a $50 million fine for a felony violation of the Clean Air Act arising from a 2005 explosion at a Texas oil refinery that killed 15 people.

C. National Commission Formation and Findings

In addition to DOJ’s investigation, by executive order on May 21, 2010, President Obama established the bipartisan National Commission; former Florida Governor and Senator Bob Graham (D) and former Environmental Protection Agency Administrator William K. Reilly (R) served as co-chairs. The principal mission of the commission is to “examine the relevant facts and circumstances concerning the root causes of the Deepwater Horizon oil disaster.” Following an extensive investigation, the National Commission released its report on January 11, 2011.

The 381-page report will be a helpful road map for other government investigators (including DOJ) and civil litigants. Although the report takes government regulators to task for inadequate oversight and conflicts of interest with the industry, the report squarely places blame with BP, Halliburton (responsible for cementing jobs on the well), and Transocean (owner of the Deepwater Horizon rig). The report’s findings identify numerous acts of apparent negligence by the three parties, and suggest that gross negligence may have contributed to the disaster. For example, the report states:

- “[T]he Macondo blowout was the product of several individual missteps and oversights by BP, Halliburton, and Transocean. . . .”
- “The immediate causes of the Macondo well blowout can be traced to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry.”
“What we . . . do know is . . . (1) each of the mistakes made on the rig and onshore by industry and government increased the risk of a well blowout; (2) the cumulative risk that resulted from these decisions and actions was both unreasonably large and avoidable; and (3) the risk of a catastrophic blowout was ultimately realized on April 20 and several of the mistakes were contributing causes of the blowout.”

“Whether purposeful or not, many of the decisions that BP, Halliburton, and Transocean made that increased the risk of the Macondo blowout clearly saved those companies significant time (and money).”

In an e-mail between two BP engineers debating issues related to the drilling and cementing of the well, one of the engineers concluded by stating: “But, who cares, it’s done, end of story, [we] will probably be fine and we’ll get a good cement job.”

The report—which the National Commission had only six months to prepare without subpoena power—provides only a general overview at this point. Discovery in the consolidated multidistrict litigation, discussed below, should provide a fuller airing of the facts.

II. Civil Litigation Arising from the Disaster

Since the well blowout, private litigants have filed more than 300 cases against BP, Transocean, Halliburton, and Cameron International, many of them class actions. In August 2010, the U.S. Judicial Panel on Multidistrict Litigation ordered 77 of the federal lawsuits consolidated as a multidistrict litigation (MDL) for consolidated pretrial proceedings before the federal court in the Eastern District of Louisiana. The panel assigned Judge Carl Barbier to preside.

The MDL drove the timing of DOJ’s December 15, 2010, civil lawsuit. Pursuant to Judge Barbier’s order, all litigants who wanted to participate in the MDL discovery had to file their lawsuits by December 15. Although DOJ often files related criminal and civil lawsuits simultaneously, the opportunity to participate in the efficiencies of the MDL discovery apparently outweighed that typical practice. For example, in his first pretrial orders, Judge Barbier set forth requirements for the preservation and production of discovery, such as the retrieval and storage of key evidence from the sea floor, including the blowout preventer.

The government and civil litigants have a shared interest in developing proof of gross negligence by BP and other related parties in causing the disaster. As noted above, findings of negligence or gross negligence can dramatically increase the criminal and civil fines faced by the parties involved in the disaster. Evidence of negligence would support criminal indictments under the Clean Water Act, and in light of the 11 deaths that occurred when Deepwater Horizon exploded, negligent or grossly negligent behavior could result in prison time for culpable individuals. Evidence of gross negligence would also eliminate the $75 million cap under the Oil Pollution Act, and it would increase civil fines under the Clean Water Act by over $15 billion. As to various claims in the civil lawsuits, while a showing of negligence would generally permit only compensatory damages, a finding of gross negligence would open the field to punitive or exemplary damages.

There is little question that BP was negligent in causing the disaster. But proving the company was grossly negligent will require a heightened showing—one that requires proof of “willful, wanton and reckless conduct that falls between intent to do wrong and ordinary negligence. Mere inadvertence or honest mistake does not amount to gross negligence.”

BP and the other related parties to the disaster will have difficulty in defending against gross negligence claims. The evidence developed so far suggests that BP ignored multiple warning signs regarding the Macondo well and compromised safety considerations in the interests of saving time and money. Those choices led to 11 deaths and an oil spill of nearly five million barrels. Many juries would be inclined to determine that such conduct resulted from recklessness, rather than mistake. Plaintiffs in the MDL discovery will also likely uncover further evidence, especially with the availability of traditional tools of compelled testimony and document discovery.
But BP will certainly put up a fight and attempt to exploit weaknesses in the National Commission’s report.21 For example, in an October 2010 letter, BP claimed that the National Commission’s spill estimate of 206 million gallons is “overstated by a significant amount”; BP claims the actual spill is potentially half that amount (which would then halve the civil penalties under the Clean Water Act). “BP fully intends to present its own estimate as soon as the information is available to get the science right.”22 BP may attempt to advance this argument by referring to the federal government’s past estimates of the extent of the spill, many of which grossly understated the amount of oil flowing from the well. The government’s “repeated adjustments of the spill’s volume” undermine its credibility and “will compromise [its] ability to argue for the highest possible penalty under the Clean Water Act.”23

Ultimately, although it has a significant stake in the litigation and will have a strong voice in driving discovery, DOJ may be the first to leave the party. As noted by a former head of EPA’s enforcement division, “[t]he government has a history of settling with companies for as little as 50 cents on the dollar in order to avoid lengthy disputes.”24 The federal and state governments settled with Exxon two years after the Exxon Valdez spill, while the private civil actions continued for years afterward.

In light of that history, BP will hope for an early and discounted resolution with DOJ on the criminal and civil charges, even before MDL discovery is complete. But as noted, that discovery will likely focus upon developing evidence of gross negligence, which could increase the value of DOJ’s claims against BP by a substantial amount. DOJ would thus be wise to exercise patience while the MDL discovery proceeds, especially in light of Attorney General Holder’s earlier promise to “ensure that anyone found responsible for this spill is held accountable. That means enforcing the appropriate civil—and if warranted, criminal—authorities to the full extent of the law.”25

But regardless of the billions that BP will ultimately pay to both government and private litigants, offshore drilling will continue as long as there remains a demand for oil. The National Commission has set forth detailed recommendations on necessary changes to the offshore oil industry and its regulators to avoid disasters like the Deepwater Horizon in the future.26 Continued discussion of those recommendations, and development of further means to protect our natural resources from future spills, should not be forgotten in the tumult of affixing blame and damages for a disaster that has already occurred.

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Endnotes
1 Other governmental entities also investigated the causes of the disaster, including the U.S. Coast Guard, the now-defunct Minerals Management Service, the National Academy of Engineering (at the behest of the Obama administration), and the U.S. House Committee on Energy and Commerce, which was the first to take testimony from company officials involved in the disaster, including former BP CEO Tony Hayward.
3 See, e.g., 30 C.F.R. § 250.400.
5 Id. § 2704(c)(1)(A).
7 See 33 U.S.C. § 1319(c).
12 See National Comm’n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore
13 Id. at 115.
15 Report at 115.
16 Id. at 125.
17 Id. at 116.
18 See In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, No. 10-md-02179-CJB-SS (E.D. La.).
19 See 33 U.S.C. § 1319(c) (providing for criminal penalties for negligent violations of CWA); United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005) (holding “an individual violates the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance, and, in so doing, discharges any pollutant into United States waters without an NPDES permit.”); United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999) (same).
20 Becker v. Tidewater, Inc., 586 F.3d 358, 367 (5th Cir. 2009) (analyzing gross negligence related to offshore drilling) (citation and quotation marks omitted).
21 For example, the report notes that “[t]he blowout was not the product of a series of aberrational decisions made by rogue industry or government officials that could not have been anticipated or expected to occur again.” Report at 122.
THE MULTIDISTRICT LITIGATION ARISING OUT OF THE GULF SPILL: AN OVERVIEW OF KEY TOXIC TORT AND RELATED CLAIMS

Sudhir Lay Burgaard

More than 300 federal court actions arising from the Deepwater Horizon explosion and oil spill have been consolidated for pretrial proceedings in a multidistrict litigation (MDL) pending before U.S. District Judge Carl Barbier of the Eastern District of Louisiana in New Orleans. The consolidated cases consist of four primary types of claims brought by nongovernmental plaintiffs—economic damages, personal injury and wrongful death, civil racketeering, and natural resources damages claims.1

This article provides an overview of the parties and some of the key claims and defenses at issue thus far in the MDL.

The Parties

The majority of plaintiffs consist of various individuals and businesses who claim that their incomes or property were adversely affected by the Gulf spill. These plaintiffs generally fall within the following categories: (1) those who derive income from offshore activities in the Gulf itself (e.g., commercial fishermen, charter-boat operators, and seafood processors); (2) those who derive income from tourism and activities in and around the Gulf coast area (e.g., tour guides, restaurants, hotels, and owners of vacation rental properties); and (3) property owners in the vicinity of the Gulf who claim their property values have been adversely affected by the spill.2 Most of these plaintiffs seek class action status. In addition, families or estates of individuals killed in the Deepwater Horizon explosion have brought wrongful death actions, and numerous individuals who claim exposure to hazardous substances as a result of the spill or the efforts to clean it up have brought personal injury actions.

The three primary defendants in these actions are BP p.l.c. and its affiliates (collectively, BP), Transocean Ltd. and its affiliates (collectively, Transocean), and Halliburton Energy Services, Inc. (Halliburton). BP owns 65 percent of the Macondo oil and gas prospect and leased the Deepwater Horizon oil rig from its owner, Transocean. Halliburton conducted cementing operations on the rig. Other defendants named in multiple actions include Cameron International Corporation (Cameron), Anadarko Petroleum Corporation (Anadarko), and MOEX Offshore 2007 (MOEX), an affiliate of Mitsui Group. Cameron manufactured and sold to Transocean the blowout preventer that failed to close the wellhead and stop the oil flow. Anadarko and MOEX are minority owners (25% and 10%, respectively) of the Macondo oil and gas prospect.

Economic Damages Claims

The most common claims asserted by plaintiffs sound in tort and seek economic damages. For example, numerous plaintiffs have asserted causes of action for negligence, gross negligence, wantonness, public and private nuisance, public and private trespass, strict liability for conducting abnormally dangerous and/or ultrahazardous activities, and strict products liability (for an allegedly defectively manufactured blowout preventer).

In addition, many plaintiffs have alleged statutory violations. On the federal side, plaintiffs typically rely on the Oil Pollution Act, the Occupational Safety and Health Act, or both. Some plaintiffs have also brought strict liability claims under various state laws and legal doctrines. For example, plaintiffs have invoked the Louisiana Oil Spill Prevention and Response Act, which provides that the owner of an oil well discharging petroleum pollutants into a waterway may be held liable for up to $350 million in damages arising from the discharge, plus all removal costs (La. R.S. 30:2482). Certain plaintiffs have also made claims under Alabama’s and Mississippi’s Extended Manufacturer’s Liability doctrines, under which Cameron could be held liable for personal injury or property damage if a court finds that it sold the blowout preventer in a defective condition that was unreasonably dangerous. Finally, some plaintiffs have also filed claims under Florida’s Water Quality Assurance Act, which prohibits the discharge of pollutants or hazardous substances into or upon Florida’s surface or ground waters, and provides a
private cause of action for persons damaged by violations under the statute, Fla. Stat. §§ 376.302(1)(a), 376.313(3).

Several plaintiffs brought claims against BP for breaching the lease granted to it by the U.S. Minerals Management Service (MMS), which is now known as the Bureau of Ocean Energy Management, Regulation and Enforcement. Under Louisiana civil law, a *stipulation pour autrui* gives the third-party beneficiary to a contract a cause of action against the promisor for specific performance, provided that a legal or factual relationship exists between the stipulator and the beneficiary. La. Civil Code, Art. 1978; *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 931 (5th Cir. 1995). Certain plaintiffs allege that they are third-party beneficiaries to the lease that MMS granted to BP, Anadarko, and MOEX, which they claim contains provisions that (1) make BP responsible for all oil spill removal costs and damages that occur during the lease term, and (2) require BP to maintain all operations within the leased area in compliance with regulations or orders intended to protect persons, property, and the environment on the Outer Continental Shelf. Plaintiffs claim that BP has breached its duties under the lease, causing damage to the natural resources, water, wetlands, commercial fisheries, and wildlife of the Gulf Coast states and the Gulf of Mexico, and causing the plaintiffs to suffer loss of income and other economic losses. See, e.g., *Taliancich v. BP, P.L.C.*, No. 10-1489 (E.D. La., filed May 17, 2010).

At least one class of plaintiffs also brought a cause of action for tortious invasion of a public right to fish, crab, and shrimp caused by the defendants’ introduction of contaminants and pollutants into the Gulf of Mexico. *Schmalz v. Transocean*, No. 10-01452 (E.D. La., filed May 12, 2010). Another class claims that the Deepwater Horizon rig was unseaworthy and unfit for the jobs and tasks required of it. *D&H Outfitters*, No. 10-01556 (E.D. La., filed May 25, 2010). These plaintiffs seek compensatory and punitive damages.

The defendants argue that the claims are unripe because they must first be presented to the Gulf Coast Claims Facility (GCCF), a $20 billion fund created by BP to compensate these types of plaintiffs. Kenneth Feinberg, the claims administrator whom BP hired to make all decisions relating to the administration and processing of claims submitted to the GCCF, must deny the claims before the court may consider them. Section 2713(a) of the Oil Pollution Act requires that property damages, environmental damages, and loss of livelihood claims—but not personal injury claims—be filed first with the responsible party or parties, which the U.S. Coast Guard has identified as BP and Transocean. If BP, through the GCCF, denies the claim or the claim is not settled within 90 days of being presented, then the claimant may seek recovery from the Oil Spill Liability Trust Fund, managed by the U.S. Coast Guard, or pursue a court action. The federal government can compensate the claimant from the Oil Spill Liability Trust Fund, and then seek reimbursement from BP. Since Transocean denies that it is a responsible party, it did not develop procedures under which claims could be presented to it; instead, plaintiffs can seek judicial relief or payment from the Oil Spill Liability Trust Fund. 33 U.S.C. § 2714.3

**Personal Injury and Wrongful Death Claims**

In addition to economic damages, certain plaintiffs have asserted claims for personal injury or wrongful death. These plaintiffs include the estates and families of those killed as a result of the Deepwater Horizon explosion. In addition, numerous spill response workers have claimed injuries as a result of exposure to chemicals and toxins in the oil and dispersants. These plaintiffs seek recovery from the defendants under negligence, gross negligence, wantonness, strict liability for ultrahazardous activities, strict products liability, nuisance, and trespass theories, and general maritime laws, as well as from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990.

But these laws contain provisions that may act to limit the defendants’ liability. Under the Death on the High Seas Act of 1920 (DOHSA), the families of the 11 workers who died as a result of the Deepwater Horizon explosion can bring wrongful death claims because the deaths occurred on the “high seas,” or beyond three nautical miles from shore. Nevertheless, DOHSA limits plaintiffs to recovery of economic damages, which includes the loss of financial support
from the decedent’s past and future earnings, the loss of the decedent’s value of household services, and funeral expenses. In 2000, DOHSA was amended after TWA Flight 800 crashed so that the families of the victims who died on the high seas in commercial aviation accidents could recover damages for the “loss of care, comfort and companionship,” but these protections have not been extended to those killed on ocean vessels such as the Deepwater Horizon.

The Merchant Marine Act of 1920, often called the Jones Act, also allows the families of the 11 decedents to recover economic damages from Transocean, the vessel owner, and for the pain and suffering that the decedent experienced prior to death, but it stops short of allowing recovery for the families’ pain and suffering.

Bills have been introduced in Congress to repeal or reform these laws. On July 1, 2010, the U.S. House of Representatives passed the Securing Protections for the Injured from Limitations of Liability Act (the “SPILL Act,” H.R. 5503). If passed by the Senate and signed into law by the president, the SPILL Act would reform maritime laws to permit recovery of noneconomic damages for family members of those killed or injured under DOHSA and the Jones Act. The law would apply to cases arising on or after the date of the Deepwater Horizon explosion, and it would also prevent parties responsible for oil spills from using bankruptcy as a basis for leaving victims uncompensated.

Another law some in Congress have sought to reform is the Oil Pollution Act of 1990. Under the Oil Pollution Act, a party responsible for an offshore facility’s oil discharge into navigable waters—here, BP and Transocean—would have to pay for direct cleanup, containment, and removal costs, but all other economic damages, such as lost business and tax revenues, would be limited to $75 million. The Oil Spill Liability Trust Fund, which is financed by an eight-cent-per-barrel tax on imported and domestic oil, would cover the next $1 billion in damages. After that, taxpayers would have to cover the costs.

House bill H.R. 5355 was introduced in the House on May 20, 2010, to amend the Oil Pollution Act to repeal the $75 million limitation of liability so that BP would be precluded from limiting its economic damages, other than removal costs, to this amount. It remains to be seen whether these laws will be passed in the Senate. Opponents argue that a higher liability cap would lead to greater monopolization of drilling operations because smaller companies would not be able to participate in the industry if they are unable to provide the necessary financial assurances.

In December 2010, Judge Barbier issued an order barring BP and its affiliates from raising as a defense to any claims by plaintiffs the statutory liability limit under the Oil Pollution Act. The order acknowledged BP’s public statements to waive the limits and rendered moot a plaintiff’s motion to make BP adhere to its statements. Thus, even if Congress does not reform the law, BP has been estopped from seeking to cap its liability.

**Civil Racketeering Claims**

At least four class action lawsuits alleging civil racketeering claims have been brought on behalf of owners and operators of businesses and properties located in Alabama, Florida, Louisiana, and Mississippi who have sustained any injury or damages to their business as a result of the Deepwater Horizon blowout. These plaintiffs brought claims under federal and state Racketeer Influenced and Corrupt Organizations (RICO) statutes, alleging that MMS is an “enterprise” within the meaning of 15 U.S.C. section 1961(4), and that BP knowingly and willfully conducted and participated in the conduct of MMS’s affairs, through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c). The plaintiffs allege that defendants infiltrated MMS to further a fraudulent scheme of causing false and misleading information to be disseminated to the public that the defendants would safely conduct offshore drilling and that they could effectively respond to and contain an oil spill like the one that resulted from the Deepwater Horizon incident. Plaintiffs allege that BP’s purpose was to fraudulently obtain oil and billions of dollars in profits from offshore oil drilling by misrepresenting and concealing the fact that the defendants were not safely conducting offshore drilling on the Deepwater Horizon. See Mid South Seafood, Inc. v. BP, P.L.C., No 10-

These plaintiffs seek injunctive relief to require the defendants to comply with the Outer Continental Shelf Lands Act and the terms of the leases and permits that MMS issued to them, and to preclude the defendants from operating any offshore drilling operation in the Gulf of Mexico without first implementing sufficient safeguards, such as adequate blowout preventers and acoustic regulators. The putative classes also seek compensatory damages for economic harm caused to their businesses and property.

The Limitation of Liability Act

Transocean filed a petition under the Limitation of Shipowner’s Liability Act of 1851 (Limitation of Liability Act) seeking to limit its liability for any loss, injuries, and damages allegedly arising from the Deepwater Horizon explosion and oil spill. In re: Triton Asset Leasing GmbH, et al., No. 10-01721 (S.D. Tex., filed May 13, 2010). Under the Limitation of Liability Act, if a claimant proves that negligence or unseaworthiness caused the accident, then the vessel owner is liable only for the post-accident value of the vessel and cargo, so long as the owner can show that he or she had no knowledge of the acts or condition constituting negligence or unseaworthiness. 46 U.S.C. App. § 183. The 160-year-old law was created before modern maritime insurance for vessels existed to protect vessel owners from potentially unlimited liability in the case of maritime catastrophes unless the acts or condition constituting negligence were within the vessel owner’s privity or knowledge. In Re Hellenic Inc., 252 F.3d 391 (5th Cir. 2001). To overcome the limitation of liability action, plaintiffs bringing personal injury and wrongful death claims will have to show that Transocean’s high-level managing agents knew or should have known about the conditions or actions that likely caused the loss. Id. at 394.

Transocean filed a petition seeking to limit its liability to the value of its interest in the Deepwater Horizon rig and its freight as they lay on the ocean bottom as of April 28, 2010, a value which it claimed did not exceed $26,764,083. Before the accident, the rig was worth approximately $650 million. The U.S. Department of Justice (DOJ) opposed the petition, arguing that it was unconscionable for Transocean to attempt to limit its liability and potentially leave thousands of people damaged by its actions without remedy. DOJ further argued that the Oil Pollution Act expressly precludes the application of the Limitation of Liability Act. In response, Transocean argued that it did not mean to restrict claims brought by the federal or state governments under federal pollution and environmental laws, but it did seek to limit its liability for personal injury and wrongful death claims. Those claims have been stayed pending a ruling on the issue.

Toxic Tort Claims Involving Chemical Dispersants

An additional set of toxic tort cases currently pending as part of the Gulf spill MDL relate not to the spill itself but to the efforts to remediate the spill. Several actions have been filed seeking damages stemming from the allegedly tortious use of the chemical dispersant Corexit 9500 (Corexit). In one suit brought against BP and Nalco Company, the manufacturer of Corexit, Gulf Coast residents claim that the use of Corexit for remediation of the spill constitutes negligence, private nuisance, trespass, and battery. The plaintiffs seek to recover personal injury and property damages, as well as medical monitoring costs and punitive damages. See Wright v. BP, P.L.C., 10-397 (S.D. Ala., filed July 26, 2010). The complaint alleges that Corexit is four times more toxic than the oil released from the spill, is hazardous to humans and marine life, and that BP dumped by plane or boat more than 1 million gallons of it, causing Gulf Coast residents to suffer breathing and gastrointestinal problems as well as property damage. It further alleges that BP applied Corexit “in an attempt to lessen [its] financial burden . . . and to lessen the public reaction to the oil spill by forcing the oil to the bottom of the Gulf.” Id. at 4–5.

Commercial fishermen have also brought a putative class action, on behalf of all Louisiana residents and workers who live on or derive income from the Gulf Coast, seeking recovery from BP and Nalco damages they claim to have suffered as a result of the use of Corexit to disperse and sink the oil into the seabed. Parker v. Nalco Co., 10-1749 (E.D. La., filed June
Although the plaintiffs allege that BP’s use of Corexit caused hundreds of cleanup workers to be sick, they do not seek personal injury damages. Plaintiffs allege that BP also applied Corexit 9527, which contains 38 percent butoxyethanol, a known animal carcinogen, in an effort to speed remediation of the spill. Plaintiffs claim that Corexit 9500 has been linked to central nervous system depression, nausea, and unconsciousness. The complaint further alleges that chemicals and vapors from oil and dispersants have been found to inflame the nose, throat and lungs and aggravate existing conditions.

**Conclusion**

The consolidation of claims in multidistrict litigation is meant to conserve the parties’ and the courts’ resources, speed up the resolution of the cases, and promote consistency in legal rulings. It remains to be seen how bellwether cases will be chosen and when they will be tried. What is certain at this point is that the largest oil spill in U.S. history has generated one of the largest sets of environmental and toxic tort litigation in U.S. history.

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**Endnotes**

1 For an in-depth discussion of natural resource damages claims, please see April Smith’s article which follows.

2 Tom Jackson discusses property value diminution claims in detail in his article which follows.

3 The GCCF and its procedures are discussed more fully in the article “Overview of the Gulf Coast Claims Facility,” by Mary Samuels which follows this article.
OVERVIEW OF THE GULF COAST CLAIMS FACILITY

Mary Samuels

One week after the explosion and sinking of the Deepwater Horizon mobile offshore drilling unit, the U.S. Coast Guard identified BP Exploration and Production, Inc. (BP) as a responsible party for the resultant spill. As a responsible party, BP is required by the Oil Pollution Act of 1990 (OPA) to advertise the procedures by which claims for removal costs and damages may be presented to BP. OPA makes BP responsible for all costs associated with the response and removal of oil, and any resulting damages, including lost earnings and profits, and real or personal property damage. The spill quickly became what many consider the greatest environmental disaster in our nation’s history, and the Obama administration forced BP to pay $20 billion to fund an independent claims process facility administered by former 9/11 fund administrator Kenneth Feinberg. The Gulf Coast Claims Facility (GCCF) was thereby established.

Emergency Claims

The GCCF began administering claims on August 23, 2010, according to the emergency claims protocol established by the GCCF. Under the protocol, claimants could obtain emergency advance payments, or payments designed to cover a six-month period of loss. Applications for emergency advance payments could be submitted on a monthly basis, from August 23 to November 23, 2010. The protocol also allowed for final claims to be presented to the GCCF at any time. However, a liability release was (and still is) required for final claims, whereby in exchange for payment, claimants forgo the rights to pursue further oil-spill related claims or legal action against BP and other potentially responsible parties. In addition, the protocol included a causation provision which tied recoveries to physical proximity to the Gulf of Mexico.

The initial operations of the GCCF led to some criticism by claimants. A common complaint was that claimants could not get any information about their claims until the GCCF made a final decision. The GCCF did not provide a formula for calculating the amount claimants received or the reason for denial of claims. Many claimants complained of slow, inconsistent payments. For example, there are several reports of individuals and businesses being paid in full, while their neighbors or coworkers with identical claims received a fraction of what they requested, or nothing at all. Some claimants accused the GCCF of making minimal payments and delaying payments in order to force individuals and businesses to take final settlement offers and waive their rights to sue for future damages. Former Alabama Governor Bob Riley called the process a “roller coaster ride.”

Following several letters from state and federal government representatives about slow payments, including a September 17, 2010 letter from the Justice Department, the GCCF began issuing emergency payments faster and became more generous—even processing claims from businesses without regard to their proximity to the shore.

Interim and Final Claims

On November 23, 2010, the GCCF transitioned from emergency claims to interim and final claims pursuant to its Protocol for Interim and Final Claims. The GCCF also established the “quick pay” option in mid-December to speed up the claims process. Currently, oil spill compensation claimants have three payment options:

1. **Final Payment**—a one-time, lump sum payment for all past, present, and future documented damage. A final payment requires the claimant to sign a full release that will prevent the claimant from filing suit against BP or other defendants for claims arising out of the spill. The GCCF will issue payment to claimants within 14 days of receiving the signed release.

2. **Interim Payments**—payments covering past documented damages. No release is required and the claimant can resubmit an additional claim once every quarter as long as additional damage can be documented. Interim payments are available through August 23, 2013. After that time, claims will be received and processed by BP instead of the GCCF.
“Quick Pay” Option—a one-time quick payment of $5,000 for individuals and $25,000 for businesses who have already received emergency payments or who receive interim payment. No further proof of damage is required, but claimants must sign the same liability release waiver required for final payments. Payments are to be made within two weeks of filing.

Under the Protocol for Interim and Final Claims, the GCCF must decide within 90 days whether to make an interim or final payment to a claimant. A claimant may elect to reject an interim or final payment determination and either present the claim to the National Pollution Funds Center or commence an action in court. The same recourse is available if a claim is denied or not ruled on within 90 days. Final payment offers are valid for 90 days. This protocol eliminates several of the issues from the emergency claims protocol, such as the physical proximity requirement, and requires all denials to include an explanation of why the claim was denied. The protocol also includes an appeal process.

Perhaps the most controversial aspect of the Protocol for Interim and Final Claims is the liability release. The GCCF provides that it will issue payment within 14 days of receiving the signed release for final and “quick pay” claims. The release requires claimants to waive their rights to sue BP and “anyone who is or could be responsible or liable in any way for the Incident or any damages related thereto,” even though the long-term losses resulting from the spill are now unknown, and may not be known for several years. Further, the release requires the claimant to promise that his or her “affiliates” will not sue on their behalf. Under the release, “affiliates” is defined broadly to include claimant’s “spouse, heirs, beneficiaries, agents, estates, executors, administrators, personal representatives, subsidiaries, parents, affiliates, partners, limited partners, members, joint venturers, shareholders, predecessors, successors, assigns, insurers, and attorneys.”

The GCCF’s response to criticism about the release has been to encourage those with questions about future losses to take interim payments instead. The first set of interim payments was made in late February 2011. Some critics, including Mississippi Attorney General Jim Hood, have argued that delaying interim payments for several months increases financial hardship on claimants and steers them toward final payment, which requires them to waive their legal rights. Even for those who can afford to wait, the interim claims process causes problems because claims must be filed quarterly, and the GCCF has 90 days for the claims to be resolved. As a result, claimants’ cash flow is delayed by up to six months from the time they incur damages.

At the January meeting of the Senate Ad Hoc Subcommittee on Disaster Recovery concerning insufficient compensation to oil spill victims, Feinberg promised to release additional information on the GCCF’s methodology for considering and awarding claims. On February 2, 2011, the GCCF released a draft of its proposed methodology for determining final settlement payments for a two-week public review period. The GCCF received a total of 1,440 comments from claimants, businesses, experts, public officials and other interested parties. According to the final guidelines, most individuals and businesses would receive a total of twice their 2010 losses as a final settlement. A special exception will be made for oyster harvesters, who will receive a final payment equal to four times their 2010 losses, since experts expect a longer recovery period for oyster beds. Final payments for businesses and other claimants with actual documented losses in 2010 of more than $500,000 will be calculated differently from other claimants—on an “individualized basis after analyzing input from the claimants as well as the experts.” The final payment offer will be the “actual documented losses in 2010 and an additional amount to compensate for the recovery and risk of possible future losses.” Final payment offers will be reduced by compensation already received in emergency advance or interim payments from BP and the GCCF. In addition, the documentation requirements for final claims will be “more rigorous and exacting” than those used for emergency claims. The methodology is based on research commissioned by Feinberg that indicates a “strong recovery” is already under way in the Gulf. Admittedly speculative, the research serves as the main basis for
Feinberg’s predictions that the coastal economy will be back to normal by the end of 2012. The GCCF plans to reassess data on the recovery of the Gulf every four months, so the calculation of future losses is subject to change over time. Nevertheless, the methodology is disappointing to several Gulf Coast residents who were hoping to receive up to three times their losses in 2010. Many claimants fear the GCCF’s studies could negatively impact how claims are viewed.

**GCCF Statistics**

According to a report released by the GCCF on February 26, 2011, the GCCF has paid approximately $3.44 billion from the fund, excluding the $60 million set aside for real estate brokers and agents along the Gulf. Of the 492,775 individuals and businesses that have filed claims (403,230 individuals; 89,545 businesses), 169,553 (34%) have been paid. A total of 449,019 claimants (369,166 individuals; 79,853 businesses) filed for emergency advanced payments and 168,873 (123,524 individuals; 45,349 businesses) have been paid (38%). Only three final payments have been made out of 92,018 claims filed (77,603 individuals; 14,415 businesses)—two to businesses (including one to a BP business partner for $10 million) and one to an individual for $7,500. Only 2 percent of the interim claims filed have been paid, or 866 (852 individuals; 14 businesses) out of 57,094 applications (42,638 individuals; 14,456 businesses). In contrast, 97 percent of the quick pay claims have been approved, or 91,503 (72,168 individuals; 19,335 businesses) out of 94,319 applications (74,487 individuals; 19,832 businesses). Sixty-three percent of payments to individuals were for $5,000 or less, and 47 percent of payments to businesses ranged between $10,000 and $25,000. The majority of claimants are from Louisiana (39%), followed by Florida (33%), Alabama (15%), Mississippi (10%), and Texas (2%).

**Court Order**

In addition to complaints about the lack of transparency, the GCCF’s stance as a “neutral” and “independent” facility was called into question when it was disclosed that BP was paying Feinberg’s firm, Feinberg Rozen, $850,000 per month, and that Feinberg had obligations to consult with and provide information to BP. On November 17, 2010, former Alabama Attorney General Troy King issued a consumer alert warning that Feinberg may be misleading oil spill victims by advising them to join in the claims process rather than sue BP, and that he was misrepresenting his role in the claims process as a neutral administrator. In response to a November letter from Louisiana Attorney General Buddy Caldwell regarding similar ethical issues, Feinberg hired New York University law professor Stephen Gillers, at the price of $950 per hour, paid by BP, to issue an ethical opinion. The opinion cleared Feinberg’s relationship with BP and stated that Feinberg is a neutral and independent facilitator. However, in December, BP ordered the GCCF to pay a $10 million business claim to an unnamed BP business partner. This was the first claim paid out of 91,000 pending final claims, and is one of only three final claims made by the GCCF to date. BP is also paying 17 attorneys to issue legal advice to people seeking to claim damages against BP. Several critics argue that this arrangement creates a conflict of interest.

On December 21, 2010, the plaintiffs’ steering committee (PSC) for the Deepwater Horizon Multidistrict Litigation (“MDL”) filed a motion in the U.S. District Court for the Eastern District of Louisiana, requesting that Judge Carl Barbier supervise the GCCF process. The PSC argued that Feinberg and BP were misleading claimants about the independence of the fund, and asked Judge Barbier to order changes to the liability release form. They asked that only BP be released from liability, that the release be limited to damages asserted or that could have been asserted in the claim based on the information available as of submission of the final claim, and that claimants retain the right to sue BP for punitive damages and other companies for compensatory and punitive damages. Mississippi, Louisiana, Florida, and Alabama expressed support for the motion.

On February 2, 2011, Judge Barbier ruled that Feinberg was not “independent” from BP and that it was misleading for Feinberg to call himself a “neutral” party in administering the GCCF. Judge Barbier ordered Feinberg and all his representatives to clearly disclose their role as “acting for and on behalf of BP in fulfilling its statutory obligations . . . under the Oil
Pollution Act of 1990,” and to advise claimants that the “pro bono” attorneys and “community representatives” retained to assist the GCCF claimants are being paid by BP. Judge Barbier concluded that BP had created a “hybrid” entity, rather than one fully independent of BP and that Feinberg’s claim of neutrality was a “direct threat to ongoing litigation.” He ordered Feinberg to stop giving legal advice to unrepresented claimants and to inform claimants of the existence of the MDL, and their right to consult a lawyer and be added to the many U.S. lawsuits that seek damages independently of the fund. Judge Barbier did not make a specific ruling on the liability release issue, but instead ordered the parties to submit additional briefing on the issue. The parties also must address the question of “whether and how BP as the responsible party is fully complying with the mandates of OPA.”

Judge Barbier’s ruling has been praised by lawyers representing Gulf Coast residents affected by the spill. Some attorneys have suggested that the ruling could result in 87,000 settlements being re-examined. In late February, oil spill victims in Florida and Louisiana filed suit against BP in their respective state courts to undo agreed settlements or to recover more money. The suits allege negligence and fraud in compensating oil spill victims, and seek economic, compensatory, and punitive damages from the GCCF. As a result of the ruling some oil spill victims may now choose to bypass the claims process and seek redress in the courts instead.

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Endnotes
1 See 33 U.S.C. §§ 2714(b), 2705(b) (“The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages.”).
2 Id. §§ 2702, 2704.
5 See Murtaugh, supra note 4.
8 Id.
14 Id.
15 Id. at 5–6.
16 Id. at 7.
17 A bibliography of the research used in developing the methodology is available on the GCCF’s Web site, http://gulfcoastclaimsfacility.com/methodologylanding.

19 See Doroshow, *supra* note 4.


21 These figures are also based on the GCCF’s February 10, 2011 report.

22 See id.


26 Id. at 14.

27 Id. at 8, 13.

28 Id. at 14.

29 Id. at 15.


32 Id.
The effects of the 2010 Gulf oil spill will be studied for years, and it will likely be some time before they are fully understood and can be reliably quantified. For months, we have been reminded of the adverse effects of the spill on businesses operating around the Gulf, on local economies, and on fragile natural resources in coastal areas. The nature of these interrelated sets of effects and how they may be appropriately categorized and measured are important considerations for potentially impacted parties and the litigation that has ensued in the wake of the spill. In the litigation arena, one particular area of importance is the proper measurement of any damages to real property value, as distinct from, though in some cases related to, other damages. Such a measurement of damages should address (1) the differentiation between business, real property, and natural resource damages; (2) the temporary or permanent nature of damages; and (3) the confounding effects of the real estate recession and the nature of financially distressed real estate markets on real property values in areas around the Gulf. Although it is too soon to tell how these issues will play out in the Gulf, past oil spills have shown us that projections of reduced property values were usually more dire than the actual impacts on property values.

Types of Potentially Impacted Values

The impacts of the spill on real property, businesses, and natural resources differ, and therefore evaluating the impacts on each of these categories involves different approaches and methodologies. The impacts on businesses, such as the loss of commercial fishing revenues, lost tourism dollars, and other losses, do not directly translate into long-term impacts on the value of real property. This is due to the fact that impacts of the spill on Gulf Coast businesses are likely to be temporary, while commercial real property values are typically established over longer holding or investment periods. In addition, they are measured using transactional data that may not fully capture short-term and highly localized economic fluctuations. Likewise, residential properties may suffer a temporary loss of use and enjoyment, but may hold their underlying real property value over the long run as markets recover and stabilize. This was certainly the situation with other spills, as discussed below. Thus, we should avoid ascribing permanent loss of market value of real property assets around the Gulf due to temporary fluctuations in business income.

Natural resource damages, in contrast to real property and business impacts, are treated as damages to “public goods” with effects measured through methods such as contingent valuation that involve various survey methodologies that attempt to quantify the often “stated” preferences of respondents. These methods are not well suited or generally accepted for measuring effects on “private goods” such as real property. Private goods such as real estate can be measured directly through the analysis of market transactions. The value of private real estate assets is established by the actions of actual market participants (buyers and sellers) rather than the often vague preferences measured through survey research instruments.¹

Temporary v. Permanent Damages

Another key issue in analyzing any diminution in the value of real property resulting from the Gulf oil spill is whether any adverse impacts are temporary or permanent in nature. Environmental stigma has been generally shown to be temporary, decreasing as contamination is remediated, and in many cases dissipating completely.² This has been referred to as the remediation life cycle.³ But it is unclear at present what will constitute remediation of the Gulf. Conflicting reports indicate that the oil has dissipated or is dissipating partly as a result of dispersal, skimming, burning, and other remedial activities; and partly as a result of natural processes. The phases of the remediation life cycle are categorized as “before,” “during,” and “after” cleanup—with reductions in stigma effects at each stage. It is unclear how far into the remediation life cycle the Gulf spill is at present. Likely, it is somewhere in the “during” period as natural
processes appear to continue diminishing oil concentrations and resulting impacts on property value.

**Business Cycle Effects**

Finally, a key issue in the valuation of property damages due to the Gulf spill involves the extensive declines in the price of real property due to the national recession and housing crisis. The value loss due to these factors has been estimated at 20 percent or more. Generally, declining market conditions tend to exacerbate the effects of contamination while improving conditions tend to mitigate them. Property values around the Gulf Coast have been adversely affected by the declining market trends for the past few years and it is too early to tell if these market trends have reached a bottom, although there is some evidence that they may have. Nonetheless, these adverse market conditions may exacerbate the effects of the spill. In addition to these broader trends, Gulf Coast communities that depend on tourism have a summer peak in visitation and expenditures. This cycle was likely impacted this past summer. Again, though, this oil spill may disproportionately impact business values rather than real property.

**Historical Perspectives**

Some of these issues may be viewed in retrospect by reviewing property value effects of past oil spills. As part of the research for the Appraisal Institute’s webinar “Oil Spills and Property Values,” several past spills were researched, including the Exxon Valdez, Ixtoc I (the previous largest spill in the Gulf), and the 1969 oil spill off Santa Barbara, California. While each of these had different characteristics due to the nature of the spill, the response, and the local markets, some generalizations are possible. One such generalization is that the expectations of local market participants concerning future property value impacts were uniformly more adverse than what was ultimately realized.

The Exxon Valdez incident involved the rupture of a tanker off a relatively undeveloped area of Alaska. Local real estate appraisers in Alaska noted that the Exxon Valdez incident did not have much of an impact on the already declining real estate market, and that the greatest effects occurred during the first year following the spill, especially for summer properties. These effects were reportedly gone within three years. Ensuing property value litigation reportedly involved allegations of permanent or temporary damages, effects on highest and best use, and public interest value.

The Ixtoc I spill, which resulted from a well blowout in the Gulf in July 1979, released three million barrels of oil, compared with 4.9 million from the Deepwater Horizon spill, and was not capped until March 1980, with remediation efforts continuing for another six months. While the spill hit the Texas beaches during the peak of summer tourism, the only significant decline in tourism reported was on South Padre Island, and even there beach populations were back to normal within two to three years. Appraisers in Corpus Christi and Rockport to the south indicated that Ixtoc did not impact market values there. One market participant noted that locals were “accustomed to tar on the beach.”

A somewhat contrasting reaction occurred in Santa Barbara, where a well blowout released 100,000 barrels of oil in January 1969. The well was closer to shore than the Deepwater Horizon and Ixtoc wells, and this may have prompted a greater local reaction. Yet, local appraisers reported that while the spill may have initially affected property values, the effects waned as the spill was contained and cleaned up.

**Conclusions**

Property value diminution issues from the Gulf oil spill will be complex and unclear for some time to come. Real property value effects will be commingled and confused with business value impacts and natural resource damages. Transactional data, traditionally the basis for opinions concerning impacts to property value, will be scarce and will be confounded by the current distressed real estate market in and around the Gulf. Adding to the complexity will be the tourism cycle in the Gulf area, with summer peaks followed by slower winters. It will take at least one or two more annual cycles to distinguish the effects of the recession, winter slumps, and other factors from the property value effects of the spill. New approaches may be
proposed, and the appraisal profession will be challenged to remain steadfast in its reliance on its three traditional approaches to value (sales comparison, income capitalization, and the cost approach) and their generally accepted derivatives. Appropriate appraisal methods and techniques, however, must be based on actual (not hypothetical) market transactions and evidence. As stated in the Appraisal Standards Board’s Advisory Opinion 9, “The analysis of the effects of increased environmental risk and uncertainty on property value (environmental stigma) must be based on market data, rather than unsupported opinion or judgment.” These admonitions should be considered by litigators and other users of the services of appraisers in evaluating Gulf spill claims related to impacts on the value of real property.

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Endnotes

4 T. Jackson, The Effects of Foreclosures on Residential Property Values, Presented at the 25th Annual American Real Estate Society Meeting, Monterey, CA (April 2009).
5 The highest and best use of a property is the legally permissible, physically possible, financially feasible use that supports the highest value. Therefore, highest and best use may be limited by physical, legal, and market (financial) considerations.
6 The sales comparison approach is based on the analysis of comparable sales. The income capitalization approach is based on the capitalization of the net operating income generated by a real property (not business income). The cost approach is based on the depreciated replacement cost of property improvements.
8 Appraisal Standards Board, Advisory Opinion 9: Appraisal of Real Property That May Be Impacted by Environmental Contamination (AO-9).
Among the myriad legal claims that have arisen in the wake of the Gulf oil spill, one type that is particularly complex is claims for natural resource damages. The Oil Pollution Act (OPA) of 1990 and the associated implementing regulations set the terms of statutory tort liability for oil spills. Additionally, several states have their own complementary oil spill liability laws and regulations. These laws include provisions for the assessment and restoration of natural resources and associated services (e.g., recreation, storm protection, carbon sequestration, air and water filtration) in the public trust. The cost of assessing and restoring the damage to these natural resources and services, as well as compensating the public for interim lost value pending full restoration, is borne by the responsible party. The valuation of these natural resource damages is an important and difficult element of oil spill risk assessment and liability. And while the full ramifications of the Gulf oil spill have not yet been determined, past experience with other spills and threatened ecosystems may be instructive.

The Value of an Ecosystem

Natural resources fall into several categories—physical, processes, goods, and services.

Ecosystems are comprised of structural components (trees, wetland plants, soil, hill slopes, etc.) and dynamic processes (water flows, nutrient cycling, animal life cycles, etc.) that create functions (water catchment, soil accumulation, habitat creation, reduced fetch, obstructions to hurricane storm surges, etc.) that generate ecological goods (fish, timber, water, oxygen) and services (hurricane and flood protection, water filtration, recreation, aesthetic value, etc.).

Understanding the economic value of an ecosystem is a complex and time-consuming endeavor. Techniques for valuing both market and nonmarket ecosystem goods and services have evolved significantly in the last decade. Within the last five years, major economic studies have been undertaken of two of America’s largest and most threatened ecosystems—the Great Lakes and the Mississippi River Delta.

The Great Lakes watershed is one of the world’s most significant ecosystems, on which the region’s fisheries, wildlife, and people depend, supporting a diverse manufacturing, shipping, agriculture, and tourism economy valued in the hundreds of billions of dollars annually. This ecosystem holds ninety percent of the United States’s and twenty percent of the world’s fresh surface water. In 2007, the Brookings Institute commissioned a report by leading economists to evaluate the economic benefits of restoring the Great Lakes ecosystem. The Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem report highlights the economic benefits of restoration, including the value of water quality, recreation and tourism, property value enhancement, fish and wildlife, and other ecosystem goods and services. The report concludes that investment of $25 billion to restore the Great Lakes ecosystem would result in direct economic benefits totaling $50 billion and would likely yield $80–100 billion in both direct and indirect benefits, including:

- $6.5–11.8 billion from tourism, fishing, and recreation
- $12–19 billion in raised coastal property values associated with remediation of areas of concern
- $50–125 million in reduced costs to municipalities
- unquantifiable but significant economic activity by making the region more attractive to business and workers

Forty percent of the continental United States drains into the Mississippi River Delta, which comprises forty percent of our nation’s coastal wetlands. The goods and services provided to the region and the nation by this vast and unique ecosystem include storm and flood protection, water supply, climate stability, food, fish and wildlife habitat, recreation, and aesthetics. Gaining Ground: The Value of Restoring the
Mississippi Delta, a 2010 report from Earth Economics, found that the Mississippi River Delta ecosystem provides an estimated $12–47 billion in benefits to people every year. “If this natural capital were treated as an economic asset, the delta’s minimum asset value would be $330 billion to $1.3 trillion (3.5% discount rate).”

Direct and indirect contributions from ecosystems to human society and quality of life have value. Some of these contributions or goods and services are traded in the marketplace and therefore can be assigned a market value. The vast majority of these ecosystem goods and services are not traded in the marketplace and are of nonmarket value. There is a spectrum of valuation techniques for assigning value to nonmarket ecosystem services.

The Natural Resource Damage Assessment (NRDA) Process

Under the Oil Pollution Act of 1990, a party responsible for a discharge or the substantial threat of a discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for damages to natural resources in the public trust. The measure of damages to these natural resources is (1) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources (primary restoration); (2) the reduction in value of those natural resources pending restoration (compensatory restoration); and (3) the reasonable cost of assessing those damages.

As provided in OPA implementing regulations, a natural resource damage assessment (NRDA) is conducted by the trustees of the public resources (e.g., federal and state natural resource agencies). A NRDA consists of three phases: (1) preassessment phase, (2) injury assessment and restoration planning phase, and (3) restoration implementation phase. During the preassessment phase of NRDA, the trustees must determine if they have jurisdiction (e.g., if OPA applies) and whether an assessment is appropriate or necessary (e.g., Are there damages or risks to resources under their trusteeship?). The second phase involves evaluation and quantification of potential injuries to natural resources and services and determination of the need for and appropriate scale of potential restoration options. The final phase of NRDA is implementation of the selected restoration actions by or paid for by the responsible party.

Challenges of Quantifying Damages to Natural Resources

The challenge of quantifying the damages to natural resources through scientific and economic studies occurs in the second phase of NRDA—damage assessment and restoration planning. Once the trustees have identified injuries that have resulted from an oil spill, they must quantify them compared to a pre-incident baseline condition. This quantification includes the temporal and spatial extent of the damage, the degree or severity of the damage, and the time required for recovery.

Current assessment and valuation tools that rely on traditional economic methods have been criticized as incomplete, resulting in efforts to develop more comprehensive approaches to damage valuation. Because non-market damages and ecosystem service losses in particular are often time-consuming and expensive to calculate using traditional economic methods, NRDA often employs replacement value to calculate the impact of a spill, which can underestimate true ecological damages. Identification of mitigation strategies is based on cost-effectiveness, but isn’t necessarily based on projects that yield the greatest ecological benefits. Consequently, NRDA estimates can often underestimate the true social cost.

Ecosystem services valuation is an evolving topic, particularly for federal agencies. Ecosystem services are contributions that support and enhance our quality of life. The goal of ecosystem services valuation is to provide standard metrics for the value of services provided by an ecosystem, which can be monetary or nonmonetary.

Assessing natural resource injuries to complex ecosystems and the associated ecosystem services is complex and time-consuming. A technically defensible comprehensive assessment can span several years.
Assessments conducted in accordance with the regulations are entitled to rebuttable presumption status in courts, rather than substantial deference. Meticulous scientific studies are required to prove or disprove causation and injury that will withstand legal scrutiny.

**Opportunities for Coordinated Legal and Technical Efforts**

As a result of the recent tragedy in the Gulf of Mexico, the NRDA process seems to be changing. These changes are likely to be both legal and technical in nature. The legacy of the Exxon Valdez oil spill is one of significant changes in law, policy, and technical methodology related to the NRDA process and oil spill liability. In response to the Exxon Valdez oil spill, the National Oceanic and Atmospheric Administration established the Damage Assessment, Remediation, and Restoration Program (DARRP). DARRP provides a team of scientists, economists, restoration experts, and attorneys to assess and restore injured resources. This interdisciplinary team of scientific, technical, and legal experts has protected and restored natural resources at more than 40 oil spills and 500 waste sites and generated more than $500 million for restoration to:

- create and restore wetlands
- create oyster reefs and other shellfish habitat
- restore coral and sea grass beds
- acquire, restore, and protect waterfowl habitat
- conduct species recovery and monitoring programs
- provide improved recreational opportunities

The continued development and refinement of improved tools and metrics will likely result in more accurate damage assessments, as well as more reliable risk assessment tools. This presents a potential opportunity for the technical and scientific community to work with the legal community to address emerging challenges comprehensively through an interdisciplinary approach. Is the development of standard metrics for valuing natural resources and ecosystem services feasible? Are there opportunities for state and federal planning processes to be integrated to optimize efficiency and effectiveness? Developments in the understanding of the value of ecosystems and their associated services are resulting in significant private sector interest and investment in opportunities to protect and restore the resources on which people and industry depend.

**April H. G. Smith, Esq.**, is a principal business professional with Weston Solution, Inc.’s Northern Gulf Coast group. WESTON provides diversified environmental engineering, sustainability planning, design, and construction services to a national client base, including those affected by the Gulf oil spill, and is currently working with plaintiffs in Gulf oil spill-related litigation.

**Endnotes**

3. See note 1 supra at 7.
5. OPA Regulations subpt. E § 990.52.
7. See note 5 supra.
CALL FOR NOMINATIONS
THE SECTION INVITES NOMINATIONS FOR THE FOLLOWING AWARDS:

ENVIRONMENT, ENERGY, AND RESOURCES GOVERNMENT ATTORNEY OF THE YEAR AWARD

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

LAW STUDENT ENVIRONMENT, ENERGY, AND RESOURCES PROGRAM OF THE YEAR AWARD

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing an issue in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2010 calendar year [consideration may be given to allowing projects that occurred in the 2009-2010 or 2010-2011 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

STATE OR LOCAL BAR ENVIRONMENT, ENERGY, AND RESOURCES PROGRAM OF THE YEAR AWARD

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2010 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: May 16, 2011.
These Awards will be presented at the ABA Annual Meeting in Toronto in August 2011.

2011 ABA AWARD FOR EXCELLENCE IN ENVIRONMENTAL, ENERGY, AND RESOURCES STEWARDSHIP

The 2011 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship was established in 2002 to recognize and honor the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship. This may include a major development in law or policy that serves to enhance conservation, responsible development, prudent resource use, and pollution abatement or mitigation, or it may be a recognition for a sustained period of leadership in the development of law and policy in this area. The Award may also be given for significant achievements in legal practice or in business, including corporate charitable contributions of funds, land, or resources; in written articles; in teaching; in advocacy before courts, agencies, legislators, or other institutions; or for any other significant achievement that evidences excellence in environmental, energy, and resources stewardship.

Nomination deadline: June 13, 2011.
The Award will be presented at the 19th Section Fall Meeting in Indianapolis in October 2011.

2011 ABA AWARD FOR DISTINGUISHED ACHIEVEMENT IN ENVIRONMENTAL LAW AND POLICY

The ABA Standing Committee on Environmental Law ("SCEL") and the Section of Environment, Energy, and Resources invite nominations for the 2011 ABA Award for Distinguished Achievement in Environmental Law and Policy. This award recognizes individuals or organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Nomination deadline: March 31, 2011.
The Award will be presented at the ABA Annual Meeting in Toronto in August 2011.

FOR FURTHER DETAILS ABOUT THESE AWARDS, PLEASE VISIT THE SECTION WEB SITE AT http://www.abanet.org/environ/sectaward/